

## A Human Rights-Based Approach to Immigrant Workers: The Policy on Removing the Canadian Experience Barrier

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### Abstract

The Ontario Human Rights Commission's (OHRC) *Policy on removing the 'Canadian experience' barrier* (CEB) is focused on the strict usage of 'Canadian experience' (CE) as an employment or accreditation requirement that raises human rights concerns, and prevents our multicultural society from using the full range of immigrant talents and competencies. The purpose of this paper is to provide an assessment of the OHRC policy initiative as a strategic link between the goals of a skilled labour force and a bias-free workplace, both of which are required to effectively compete in the global economy. This paper argues that making the policy case for the human rights dimensions of social exclusion in hiring is an innovative way to advance creative organizational change that effectively responds to the marginalization and racialization of newcomer populations, by dismantling the chronic rationalization of a harmful workplace practice.

### Situating the Rights Dimensions of Social Inclusion

As globalization, technological change, collective human experiences and advances in knowledge drive human societies in the 21st century, how successfully Canada continues to manage the challenges of diversity will have an important bearing on the social and economic success of the country, the quality of our communities and the success of our corporations (Statistics Canada 2003, 2008; The Conference Board of Canada, 2004, 2005; Royal Bank of Canada, 2005; Gignac, 2013). In this regard, transnational immigration intake is a public policy priority designed to respond to a range of skills-related challenges in Canadian workplaces. The purpose of transnational immigration is to contribute to national progress and position Canadian society to effectively compete in the global knowledge-based economy. However, the modern management of multicultural diversity has encountered a vexing historical impasse. The acquired techniques and strategies for the social and economic integration of immigrants have now failed to stem the precipitous labour-market decline of the more recent groups of racialized newcomers<sup>i</sup>

As the Canadian Labour Force Survey (LFS)<sup>ii</sup> reveals, there has been a dramatic downturn of immigrant labour market outcomes in the last few decades. This coincides with a major demographic shift in immigration intake – from traditional European source countries to non-traditional and non-White source countries. Over the period from 1996 to 2005, for instance, 'visible minority'<sup>iii</sup> source regions (namely, Africa and the Middle East, Asia and the Pacific, and South and Central America) have

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accounted, on the average, for close to 80 percent of annual immigration to Canada. (Citizenship and Immigration Canada, 2006:26). Meanwhile, as a group racialized Canadians earn significantly less than previous immigration cohorts and their non-racialized Canadian counterparts. One recent study, for example, found that racialized Canadians earned only 81.4 cents for every dollar paid to non-racialized Canadians (Block and Galabuzi 2011: 3). In this connection, there is now a significant body of racialization literature documenting how the modern workplace is culturally regulated to the disadvantage of foreign-born and foreign-trained and predominantly non-European and non-White immigrant workers (Bauder 2003; Samuel 2004; Liu 2007; Foster 2008a,b; Foster 2009a,b; Oreopoulos, 2009; Houle and Yssaad, 2010).

Supporting research has confirmed that vulnerable populations of non-White global migrants are now over-represented in survival jobs and/or contingent work, and are thereby more likely to experience the full impact of labour market segmentation (Das Gupta 1996; Ng 2001) – including atypical employment contracts, precarious forms of non-standard work, limited social benefits and statutory entitlements, job insecurity, low job tenure, low wages, and high risk of ill health (Judge and Vosco, 2003). In this respect, racialized outcomes in the workplace are now experienced as an element of social structure not simply an irregularity in it. The upshot is, Canada has grossly minimized the capabilities of the racialized communities it claims to embrace.

Racialization research has discovered that the social exclusion of immigrants of colour can only be comprehensively understood in the context of power relations which includes environments of cultural discrimination (Harvey, 2001; Bauder, 2003; Foster, 2006; 2008a). This implies that the tensions between the power, beliefs, norms, and values of marginalized minorities and the dominant majority culture in Canada act as push and pull factors that continue to increasingly challenge Canada's commitment to multicultural inclusiveness. This also suggests widening the search for possible policy solutions into the realm of human rights approaches that can address structural factors related to the imbalance of power between marginalized and dominant groups (Goodhart, 2009: 4-5).

The Ontario Human Rights Commission's (OHRC) *Policy on removing the 'Canadian experience' barrier*<sup>iv</sup> makes a case for a rights-based critique of social exclusion that is worthy of close examination. This paper contends, by officially integrating a coherent body of human rights principles into workplace standards and regulatory practices, the OHRC Policy on removing the CER provides a guide for evaluating race and residency norms; challenging any hiring criteria irrelevancies; and ensuring that human rights policy interventions reach the most marginalized, excluded or discriminated against segments of the immigrant population. This is an example of 'right to work' policymaking that puts people first, and is driven by a human-centred economics.

### **The Canadian Experience Rule (CER) and the Politics of Culture**

The 'Canadian experience' rule (CER) occurs in its basic form when immigrants cannot get a job because they do not have Canadian experience, and they cannot get Canadian experience because they do not have a job. This Catch-22 demand for unobtainable Canadian experience serves as a traditional management technique that is core to the business model many employers and job recruiters have routinely adopted while operating within legal migration streams (Ornstein and Sharma, 1983; Basran and Zong, 1998, Foster 2006). Hence, the Canadian Labour and Business Centre has noted, despite the fact that Canadian employers are in desperate need of skilled professionals and trades people, the majority of employers do not immediately conceive of the foreign trained workers as a viable resource for mitigate labour shortages. The idea of hiring recent immigrants is contextualized as a peripheral hiring channel by a majority employers (CLBC 2004: p. 1).

In her seminal study on Foreign-Trained IT Professionals, Jane Harvey (2001: 24) observed that "Canadian experience means more than having worked for a Canadian company; it means knowledge of culture on a broad level as well as of the industry and specific organizations." Harvey points out that many Canadian recruiters express their concern with the immigrant job seekers' basic ability to

comprehend. Others expressed concern with accents but it was not clear how this reduced newcomers' productivity. The ability to engage in social chat in the workplace was also identified. These findings indicate that judgment on language abilities is heavily constructed on prevalent social and cultural norms; often placing unreasonable expectations on newer immigrants (Harvey 2001).

The rationale behind the peripheral hiring status of newcomers is that 'being culturally fit' implies 'being immediately productive'. This can lead to a systemic barrier for entrance into the labour market as Canadian work experience, accent requirements and culture-specific communication skills often place unreasonable expectations on newer immigrants. (Liu, 2007: 10). Similarly, it has been discovered that Canadian credentials are also valued as easy proof of the applicant's soft skills and whether they can fit into the new workplace (Liu, 2007: 10). The CER often relies on the language and politics of culture in the corporate workplace; ideologized narratives on evaluative criteria such as 'comfort level,' and 'familiarity,' 'personal suitability,' and "picturing the right person in a setting" in discourses on hiring qualifications and credentials (Foster, 2009). Hence, Canadian employers and job recruiters often take-for-granted a competency framework, that is centred by their relationship to culture and power, as a critical foundation for discounting or devaluing foreign training and skills. In this respect, the workplace can be culturally regulated to the disadvantage of foreign-born and foreign-trained and predominantly non-European and non-White immigrant workers.

Consider how Philip Oreopoulos' (2009) recent "resume study" transcends discourses on the assessment and recognition of credentials and enters the paradigm of culture and race. Oreopoulos sent out six thousands of resumes in response to online job postings across multiple occupations in Toronto to investigate why Canadian immigrants, allowed in based on skill, struggle in the labor market. Resumes were constructed to plausibly represent recent immigrants under the point system from the three largest countries of origin (China, India, and Pakistan) and Britain, as well as non-immigrants with and without ethnic-sounding names. In addition to names, Oreopoulos randomized where applicants received their undergraduate degree, whether their job experience was gained in Toronto or Mumbai (or another foreign city), whether they listed being fluent in multiple languages (including French). While many of the findings of the study could be characterized as nuanced, the general outcome was that job applicants with English-sounding names received interview requests 40 percent more often than applicants with Chinese, Indian, or Pakistani names. Overall, the results suggest considerable employer discrimination against applicants with ethnic names or with experience from foreign firms.

Liu (2007) has suggested the application of the CE and credentials rules tend to create a one-size-fits-all framework that normalizes whiteness. "Cultural barriers involve how employers interpret newcomer job seekers' personal attributes based on mainstream social and corporate cultural norms. Often the attributions involve an undervaluing by employers of immigrant skills, experience and work habits" (Liu, 2007: 4). This connotes 'cultural deficiency' and is attributed to racialized newcomers within the Canadian employer's hegemonic imaginary of an entrenched 'cultural hierarchy'. In Liu's view, "a focus on cultural barriers allows for an examination of the dynamic relationship that exists between job seekers and employers, a relationship that invariably favours employers. This power imbalance between employers and job seekers reinforces the cultural gauges in evaluating job seekers, to the detriment of newcomers." (Liu, 2007: 4)

Bauder (2003) reflected on the social exclusion processes that characterize the 'Canadian experience standards of cultural competence'. Bauder observes that throughout Canadian history, immigrants have been the shock absorbers of cyclical swings of the economy. Until the early 1990s, Canada's immigration levels were synchronized with the business cycle, increasing during boom periods and scaling back during recessions. Although immigration levels are no longer co-ordinated with the business cycle, racialized immigrants continue to be the last to be hired and the first to be fired. In his view, the primary reason is that today professional associations and the business establishment actively exploit and/or exclude non-Canadian immigrant labour from secure positions in the most highly desired occupations in order to reserve these occupations for Canadian-born and Canadian-educated workers. Using Pierre Bourdieu's (1984) theory of cultural capital and his interpretation of the educational system as a site of social reproduction as a starting point, Bauder extends the theory to a generic immigration

context by arguing that the non-recognition of foreign credentials in Canada amounts to the culture-based systematic nullification of immigrant workers from the upper segments of the labour market. What Bourdieu's idea of cultural capital can contribute to literature, says Bauder (2003: 700) is a cultural interpretation of institutionalized labour processes. In particular, he suggests that "institutionalized processes of cultural distinction contribute to the segmentation of immigrant labour" (Bauder, 2003: 699).

This is consistent with a broad-based study on Career Advancement in Corporate Canada (2007) that focused on visible minority managers, professionals and executives employed in large Canadian companies and firms.<sup>v</sup> In the first study of its size – with over 17,000 managers, professionals, and executives employed in 43 Canadian companies and firms – the researchers explore how 'visible minority' women and men perceive the experience of working in corporate Canada. The study found considerable evidence that the perceptions of senior management commitment to diversity and career advancement processes, as well as relationships with managers and colleagues, differed among visible minority respondents and White/Caucasian respondents. There is also evidence that these perceptions and experiences are closely linked to levels of organizational commitment and career satisfaction, which are known to be important proxies for organizational performance. Visible minority respondents felt less satisfied with their careers compared to White/Caucasian respondents. Approximately 50 percent of visible minority respondents with foreign educational credentials felt their employers did not recognize their educational credentials as being "on par" with equivalent Canadian degrees, diplomas or certificates. Only 23 percent of White/Caucasian respondents with foreign educational credentials felt the same way. Visible minority respondents with foreign educational credentials that were not recognized as being on par were the least satisfied with their careers. Twenty-four percent of these individuals plan to explore career opportunities outside Canada in the next three years. All of this speaks to the fact that professionals of colour in Canada are co-opted into maintaining and perpetuating a system dominated by a racialized, two-tiered corporate ethos.

Meanwhile, a Conference Board of Canada (2004) report has confirmed that failing to recognize the past skills and experience of racialized immigrants is a modern phenomenon causing harm to the entire Canadian economy, not just racialized newcomers. The Board estimates that the annual costs of unrecognized learning for people of colour ranges from \$2.2 billion to \$3.4-billion. The Board report concludes that a learning recognition gap, due to a failure to recognize foreign credentials or foreign work experience, explains a portion of the wage gap; and full elimination of this wage gap would benefit not only racialized minorities, but the Canadian economy as well.

### **The Human Rights Based Approach to Work Rights**

In the words of the *Universal Declaration of Human Rights* (and affirmed in the Preamble to the *Ontario Human Rights Code*) – human rights are about creating an environment in which people can develop their full potential and lead creative lives by assuring "the dignity and worth of every human being without distinction" and promoting "social progress and better standards of life in larger freedom."<sup>vi</sup>

The principles of human rights include equality and equity, accountability, empowerment and participation. These principles provide a lens for the conceptual clarity of social justice in terms of the distribution of wealth, opportunities, and privileges within a society (Sen, 2004). Adopting a human rights-based approach (HRBA) means using human rights principles to interrogate the norms and standards of a society (Jonsson, 2005); and to intervene when necessary to ensure that the distribution of wealth, opportunities, and privileges within a society reach the most marginalized segments of the population (Häusermann, 1998; Marks, 2003; MacNaughton & Frey, 2011).

In this connection, the right to work and employment is central to social justice outcomes in a society, and has an indelible influence on every other human rights value. A human rights-based approach to work is a conceptual framework, or way of dealing with complex employment-related issues, that are normatively based on human rights standards and operationally directed by the struggle to eliminate

barriers, increase inclusiveness in the workplace, and enrich society as a whole (Mander, 2005; Schmidt-Traub, 2009<sup>vii</sup>).

The link between human rights and work has also brought along a certain language of rights (Fudge, 2007). The word “work” is understood to be broader than employment or labour, reflecting “the variety of ways in which people contribute to the economy and society” (Rogers et al. 2009: 223-4). In a global context, ILO Director-General Juan Somavia introduced the concept of “decent work” in 1999 shortly after assuming his position (ILO, 1999). The word “decent” denotes that work must be of acceptable quality in terms of income, working conditions, job security, and rights to endure the dignity of workers. As the Director-General asserted in 1999, decent work “is the most widespread need, shared by people, families and communities in every society, and at all levels of development” (ILO, 1999: v).<sup>viii</sup>

In a rights-based approach, workplace hiring is not just regarded as market issue but an equity issue as well. Applied to the foreign credentials and accreditation gap this puts a much clearer responsibility on governments and workplace institutions to engage measures to promote equal opportunity and/or to prevent employment discrimination. A rights-based approach situates every human being both as a person and as a right-holder. It recognizes the existence of rights, and reinforces capacities of duty bearers (e.g. employers and governments) to respect, protect and guarantee these rights. It strives to secure the freedom, well-being and dignity of all people everywhere, within a balanced framework of essential standards and principles, duties and obligations; by supporting mechanisms to ensure that entitlements are attained and safeguarded.

The assumption of work rights creates a corresponding duty and responsibility on the part of governments and employers to integrate newcomers into the workforce. An inclusive human rights lens gauges employment relationships using the metric of mutual recognition and interdependence – where the duty bearers are accountable for respecting, protecting, and fulfilling human rights; while the rights holders need to ask what they should do to help promote and defend their freedoms. This action keeps employers accountable for developing effective workforces and their governments accountable for creating sustainable societies. This also means a central goal of a rights-based approach to work, is to increase the capacity of both duty bearers (governments and employers) to meet their obligation to eliminate discrimination in employment; and to empower rights holders (employees) to claim their rights to the gainful employment to which they are qualified, and reach their full work potential.

In the last few decades the domestic dialogue on decent work and fair employment practice in Canada has been incited by the foreign credentials crisis (i.e., the non-accreditation of foreign-trained workers and their resultant income inequality). Stories abound in everyday life regarding immigrants with foreign medical degrees and PhDs forced to drive taxi cabs in order to make a living. In the light of a growing awareness of such wasted immigrant talent, the search for practical and sustainable solutions has acquired a sense of urgency.

From a human right perspective, work rights are defined as mutual entitlements which belong to all human beings regardless of race, ethnicity, or place of origin; and so, ought to be conferred in the workplace on newcomers and native-born alike. At the same time, a human rights lens is calibrated to detect dimensions of “*implicit cultural bias*”<sup>ix</sup> that are embedded in modern race relations, and are now replacing earlier forms of overt discrimination. Today, for instance, accents and names can be sources of discrimination in the job market, as well as overt discrimination based on colour (Oreopoulos, 2009). In modern workplace, implicit dimensions of bias can lead to hidden injuries of race that are subtle and indirect, and revolve around subjectivities related to corporate competencies, skills transferability and credential evaluation.

As the newest official protocol, the OHRC right to work policymaking on the CEB aims to support better and sustainable workplace outcomes through the direct critical analysis of residency norms, different “microaggressions of implicit bias”<sup>x</sup>, and power dimensions of culture and race which lie at the heart of immigrant skills discounting in Ontario, and Canada. Hence, it provides a potentially significant opportunity for using a holistic human rights framework in a proactive manner in order to achieve decent work for all, and promote “social progress and better standards of life in larger freedom.”<sup>xi</sup>

## **The New OHRC Workplace Policy Guideline Regarding Canadian Experience**

Population policy and labour policy solutions to immigrant income inequality to date have primarily concentrated on providing assistance adjusting to the Canadian marketplace – such as, upgrading technical and essential skills, matching jobs and skills, and/or improving essential skills of newcomers in Canadian workplaces, particularly those in non-regulated occupations (Gilmore, 2009; Canada's Economic Action Plan, 2012: 285-356)<sup>xii</sup>. In the regulated professions, policy development has been directed toward foreign credential assessment processes (George & Chazeb, 2012). Headway to date with this 'marketplace-adaption approach' has included working with provinces and territories to negotiate bilateral agreements on immigration-needs and settlement instruments (Albiom, 2009; Siemiatycki & Triadafilopoulos, 2010); engaging post-secondary institutions and assessment agencies; engaging employers as primary stakeholders and negotiating with regulated professions (Rai, 2013); improving coherence in regulatory processes to recognize credentials and skills (Watt et. al., 2008); as well as sponsoring mentoring programs, and 'clear career path' and 'information portal initiatives', 'help strategies' and the like (Novak & Chen, 2013). Still, marketplace-adaption initiatives for immigrant workplace integration has had limited success stopping, or even slowing, the labour market decline of racialized newcomers.

Indeed, Cheung (2005) suggests that the major limitation of foreign credentials 'assessment and recognition' literature and policy development in Canada today lies in the categorization of immigrants from an inadequate reference point: either that of the White mainstream, or of an otherwise undifferentiated victim. Rather than disaggregating the race-culture data for a nuance discussion of social policy, much of the credentials assessment literature and recognition effort provides a generalized, multipurpose body of knowledge. But, in attempting to provide knowledge that is applicable to all, it provides a body of knowledge that is, in actuality, applicable to none.

Under the auspice of the *Human Rights Code Amendment Act*<sup>xiii</sup>, the OHRC policy on removing the CER is designed as a tool to begin untangling the threads of cultural discrimination in the workplace. This, of course, does not mean the absence of culture, or culturally-specific job requirements. Instead, the policy on removing the CER is aimed at eliminating irrelevant criteria and maximizing job opportunity and skills usage. This goes beyond the conventional market techniques for immigrant socio-economic adjustment, and makes a statutory/ lawful case for the human rights dimensions of social exclusion.

For instance, a right to work approach to foreign-trained labour does not preclude the possibility of requiring further train or skills development of newcomers, matching local needs. In a modern knowledge-based society, life-long learning helps to develop and enhance a worker's employability. This ensures that the individual's skills and work experience are maintained and improved as work, technology and skill requirements change. "Lifelong learning ensures that the individual's skills and competencies are maintained and improved as work, technology and skill requirements change; ensures the personal and career development of workers; results in increases in aggregate productivity and income; and improves social equity" (ILO, 2000, para. 5). Additionally, applying a human rights lens against work discrimination also ensures the portability of newcomers' industry-based and professional competencies, which facilitates their fair treatment and effective transition into the world of work. This entails organizational hiring procedures based on mutual recognition and empowerment that are as inclusive as possible and steps taken "to accommodate applicants covered by the *Code*. This would mean assessing people on an individual basis, and would include considering non-Canadian experience and other qualifications" (OHRC 2013: 12).

Accordingly, the OHRC's policy position on removing the CER is grounded in the premise that if a multicultural mosaic is a fundamental strength of our society we cannot abide a two-tier system of employment, where CE is inherently valued more by the marketplace than equivalent non-Canadian experience. As rights-holding equals "[A] strict requirement for 'Canadian experience' is *prima facie* discrimination (discrimination on its face) and can only be used in very limited circumstances" (OHRC 2013: 3). Immigrant workers are not simply subject to the whims or prejudices of employers and job recruiters. As rights-bearing equals "[A] distinction based on where a person acquired their work

experience may indirectly discriminate based on *Code* grounds such as race, ancestry, colour, place of origin and ethnic origin” (OHRC 2013: 8). Imposing requirements of this nature can be a barrier in recruiting, selecting, hiring or accrediting, and so, may contravene the *Code*. “Even where employers and regulatory bodies may be acting in good faith, a candidate’s Canadian experience, or lack thereof, is not a reliable way to assess a person’s skills or abilities” (OHRC 2013: 11). Therefore, as rights-holding equals, there is a duty to potential immigrant hires to justify its use, based on the established legal tests set out by human rights court decisions and OHRC policy (OHRC 2013: 8).

A rights-based approach recognizes employers and regulatory bodies should always have to show why CE is needed. The onus as duty-bearers is placed on employers and regulatory bodies to show that a requirement for prior work experience in Canada is a bona fide requirement, and central to the core responsibilities of the job. Hence, it is specified under the *Code*, where discrimination is found, the organization or institution the claim is made against may establish a defence to the discrimination by showing that the policy, rule or requirement that resulted in unequal treatment is a legitimate standard, or a ‘bona fide’ requirement. In the *Meiorin*<sup>xiv</sup> decision, the Supreme Court of Canada set out a three-part test to determine whether a standard that results in discrimination can be justified as a reasonable and bona fide one. The organization or institution must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed
2. was adopted in good faith, in the belief that it is needed to fulfill the purpose or goal, and
3. is reasonably necessary to accomplish its purpose or goal, because it is impossible to accommodate the claimant without undue hardship.” (OHRC 2013: 11).

By framing regulatory standards for how individuals, employers, service providers and governments should act to ensure compliance with the *Code*, the policy on removing the CER creates a strategic link between a skilled workforce and bias-free work environments. For employers it provides an available regulatory support to prepare them for integrating newcomers into the workplace. For employees it promotes the equal opportunity and access to jobs for which they are qualified and match their abilities. This provides a conceptual bridge between the needs of Canadian employers for capable professionals and trades people, on the one hand; and a growing non-White immigrant workforce that is facing extreme difficulties finding suitable employment, on the other.

### **Best Practices**

A rights-based approach ensuring that individuals can fully participate in the workplace brings the power dimensions of culture and race to the fore; and with this, the need to tackle the tensions revolving around the issues/subjectivities of corporate competencies versus equal employment opportunity, suitability versus representation, and social reproduction versus merit principles. This is commensurate with the articulation of OHRC “best practices” to help organizations make sure that they are following the *Code* and principles of workplace fairness:

## **Best Practices<sup>xv</sup>**

### **Employers, representatives of employers and regulatory bodies should:**

- Examine their organizations as a whole to identify potential barriers for newcomers; address any barriers through organizational change initiatives, such as by forming new organizational structures, removing old practices or policies that give rise to human rights concerns, using more objective, transparent processes, and focusing on more inclusive styles of leadership and decision-making.
- Review job requirements and descriptions, recruitment/hiring practices and accreditation criteria to make sure they do not present barriers for newcomer applicants.
- Take a flexible and individualized approach to assessing an applicant's qualifications and skills.
- Give an applicant the opportunity to prove his/her qualifications through paid internships, short contracts or positions with probationary periods.
- Provide newcomers with on-the-job training, supports and resources that will enable them to close "skill gaps" (*i.e.* acquire any skills or knowledge they may be lacking).
- Use competency-based methods to assess an applicant's skill and ability to do the job.
- Consider all relevant work experience – regardless of where it was obtained.
- Frame job qualifications or criteria in terms of competencies and job-related knowledge and skills.
- Support initiatives designed to empower newcomers inside and outside of their organizations (for example, formal mentoring arrangements, internships, networking opportunities, other types of bridging programs, language training, *etc.*).
- Monitor the diversity ratios of new recruits to make sure they reflect the diversity of competent applicants overall.
- Implement special programs, corrective measures or outreach initiatives to address inequity or disadvantage affecting newcomers.
- Supply newcomers and social service agencies serving newcomers with information about workplace norms, and expectations and opportunities within the organization.
- Retain outside expertise to help eliminate barriers to newcomer applicants.
- Form partnerships with other similar institutions that can help identify additional best practices.
- Provide all staff with mandatory education and training on human rights and cultural competence.

### **Employers, representatives of employers and regulatory bodies should not:**

- Require applicants to have prior work experience in Canada to be eligible for a particular job.
- Assume that an applicant will not succeed in a particular job because he or she lacks Canadian experience.



- Discount an applicant's foreign work experience or assign it less weight than their Canadian work experience.
- Rely on subjective notions of "fit" when considering an applicant's ability to succeed in the workplace.
- Include a requirement for prior Canadian work experience in the job posting or ad, or a requirement for qualifications that could only be obtained by working in Canada.
- Require applicants to disclose their country of origin or the location of their work experience on the job application form.
- Ask applicants questions that may directly or indirectly reveal where their work experience was obtained.
- Ask for local references only.

The key factors determining best practices in employment here are evidence of effectiveness based on human rights learning that provides organizations a greater return on the investment and better outcomes in managing a diverse workforce. In this regard, a rights-based best practices framework enhances the employer/ employee relationship through the overt recognition of the relevance of employment rights and obligations; ensures an appropriate legal framework; and promotes organizational change based on human rights principles of equality and equity, accountability, empowerment and participation. All of these elements should, however, avoid being too prescriptive. Instead, what is required for the actualization of all human resource potential is faith in the dynamism and responsive nature of the rights framework to improve employment outcomes and reduce disparities once it is brought inside the confines of workplace settings.

### **Future Prospects**

Removing the CER is also consistent with current public discourses on breaking down job requirements into specific competencies, and striving to ask candidates to demonstrate their experience (Horton 2000). This is commonly identified as part of the larger bias-free movement to assess specific skills and competencies in hiring contexts (Kessler, 2006). Researchers and community-activists who are proponents of the bias-free movement only rarely invoke human rights concepts, although many are open to related notions. Some proponents address the moral dimensions of economic issues, but tend to avoid human rights language. Others apply notions of accountability, transparency, participation, and the like in the context of labour policy, without relating them to a human rights framework. Together, proponents of the bias-free movement on both the research and activist side continue to raise awareness and promote a more nuanced understanding of discriminatory workplace barriers – particularly in areas of interviewing, recruitment, training and promotions.<sup>xvi</sup>

It is fair to say, however, the OHRC's anti-discrimination mandate has a policy capacity that extends beyond consciousness raising. The prominence of the OHRC's public policy mandate is given by the Supreme Court of Canada. The Court has characterized human rights legislation as quasi-constitutional. This means that the *Ontario Human Rights Act* is almost as fundamental to our legal

structure as the *Charter*. Moreover, the Court has ruled that where there is a conflict between human rights legislation and other laws, human rights legislation takes priority, unless the human rights law itself creates a clear exception. This highlights an important distinction from other equal employment opportunity initiatives. The OHRC offers a robust ‘mutual recognition and empowerment’ stance on the constitutional footing of enforceable rights with regulatory authority (Foster and Jacobs, 2014: 370). This provides a unique capability – both rule- and policy-based – to dismantle the chronic rationalization of a harmful workplace practice, and contribute to organization-based social change.

Moving forward in Ontario, we can expect the policy to remove the CER will be given great deference as it is applied to the facts of new cases that come before the courts and administrative tribunals of competent jurisdiction. Assuming the usual juridical path, the OHRC’s new policy will result in a series of complaints from the workplace that are resolved one way or another in courts, until there is enough scope to these complaints to progressively legitimize expanded workplace hiring practices, and routinize more comprehensive definitions of corporate competence and ‘qualified to practice’ standards.

There are, however, already indications that the new CE policy is gaining some traction in the Ontario workplace. Scans of major internet job sites and public advertisements, pre- and post-implementation of the new policy, show that reference to CE is already starting to be weaned from the hiring criteria in many occupational sectors in Ontario. Daily informal scans conducted by operational services of the OHRC indicate that the vast majority of job postings specifying CE are now for positions outside of Ontario, in other provinces. A typical scan of a major internet job site in the month of June (2014) revealed that of 19 job postings that called for CE only 1 job posting was for a position in the province of Ontario.<sup>xvii</sup> Initial signs are that the policy on removing the CER has at least contributed to a general increase of awareness and more conscientious attention being paid to potential biases related to the cultural interpretation of institutionalized labour processes.

## Conclusion

The language of CE has been taken under human rights advisement. At present references to CE appear to be more deliberately related to specific job requirements in Ontario. It can be observed that hiring criteria across various sectors tend to coalesce around cognitive or ‘hard’ skills and behavioral or ‘soft’ skills – including education, job specific skills, previous experience, effective team work atmosphere, familiarity with product industry, excellent written and verbal communication, and eligibility to work in Canada. How these combinations of ‘soft’ and ‘hard’ skill-requirements are gauged in face-to-face interview sessions is subject to further investigation. It is possible, for instance, that many of the so-called ‘soft’ skills – related to such abilities as teamwork, communication, flexibility, patience, time management, or motivation – will still be interpreted by job interviewers from a dominant culture paradigm. In this circumstance, soft skills can become a euphemism for CE, utilized in the absence of other offending language. Nonetheless, by making the policy case for the human rights dimensions of social exclusion in hiring, the OHRC’s guidance on removal of the CER provides a new depth perception to workplace dynamics; and a new measure of leverage to racialized newcomers throughout the province in their pursuit of gainful employment.

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## Endnotes

i The term 'racialized' is used to acknowledge "race" as a social construct and a way of describing a group of people. Racialization is the process through which groups come to be designated as different and on that basis subjected to differential and unequal treatment. In the present context, racialized groups include those who may experience differential treatment on the basis of race, ethnicity, language, economics, religion (Canadian Race Relations Foundation, 2008).

ii Labour Force Survey (LFS). Found in Yssaad, L. (2012) "The Immigrant Labour Force Analysis Series The Canadian Immigrant Labour Market 2008-2011." *Statistics Canada* – Catalogue no. 71-606-X, December. Ottawa. <http://www.statcan.gc.ca/pub/71-606-x/71-606-x2012006-eng.pdf>.

iii 'Visible minority' refers to whether a person belongs to a visible minority group as defined by the Employment Equity Act and, if so, the visible minority group to which the person belongs. The Employment Equity Act defines visible minorities as "persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour". The visible minority population consists mainly of the following groups: Chinese, South Asian, Black, Arab, West Asian, Filipino, Southeast Asian, Latin American, Japanese and Korean. The term visible minority as a social category and unit of analysis has come increasingly under attack and is contested as an 'asymmetrical term' that implies Whiteness as a normative standard by which others are measured, and therefore, the others are defined by what they are not. For the purposes of this paper, the term 'visible minority' is used when it is consistent with the original source materials and documents; otherwise the term 'racialized group' is employed.

iv See – Ontario Human Rights Commission (2013) *Policy on Removing the "Canadian experience" barrier*. February 1. <http://www.ohrc.on.ca/en/policy-removing-%E2%80%9Ccanadian-experience%E2%80%9D-barrier>. The OHRC's policy is written in an accessible and user-friendly style. One of the key features is that it provides many 'best practice' examples in order to reinforce right-holder and duty-bearer responsibilities. This paper analyzes the policy's deep structure and grounds with a view toward exploring its organizational change potentials.

v Career Advancement in Corporate Canada: A Focus on Visible Minorities ~ Survey Findings.(2007) *Catalyst and the Diversity Institute In Management & Technology*.

<http://www.ryerson.ca/tedrogersschool/diversityinstitute/english.pdf>

vi Charter of the United Nations Preamble, <http://www.un.org/en/documents/charter/preamble.shtml>; also see – Human Rights Code, RSO 1990, c H.19, <<http://canlii.ca/t/51tsz>> retrieved on 2015-05-04,

vii While not directly focused on the right to work, Schmidt-Traub introduces a high-level analysis and outline of how Human Rights-Based Approaches can inform the choices and decisions that policymakers need to make. In this respect, it provides a nice 'global' context to situate the OHRC right to work policymaking on the Canadian experience rule.

viii In considering globalization and work rights, the Universal Declaration of Human Rights, Article 23, Right to Work states:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
  2. Everyone, without any discrimination, has the right to equal pay for equal work.
  3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
  4. Everyone has the right to form and to join trade unions for the protection of his interests.
- Right to work

Further, the U.N. General Assembly adopted complaint mechanism and a broad range of protections covered by the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the Optional Protocol including, among others, the right to freely chosen work, the right to full employment, the right to fair wages, the right to an adequate standard of living, the right to safe and healthy working conditions, the right to rest and leisure, the right to form and join trade unions, the right to strike, and the right to social security. See – International Covenant on Economic, Social, and Cultural Rights art. 6(1), Dec. 16, 1966, 933 U.N.T.S. 3; and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, arts. 1-15, U.N. Doc. A/RES/63/117 (Dec. 10, 2008). For the purposes of this paper, discussion of foreign-trained workers in Canada has been localized to the rights revolving around standard work relations, the right to gainful employment, and the right against discrimination..



ix Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Researchers contend that implicit biases are predilections held by all that operate largely outside of one's awareness. Although hidden, these biases are both pervasive and powerful (See, for example, Dovidio, Gaertner, Kawakami, & Hudson, 2002, p. 94; also Banaji & Heiphetz, 2010). Put another way, implicit bias is defined in research as the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control. The underlying implicit attitudes and stereotypes responsible for implicit bias are those beliefs or simple associations that a person makes between an object and its evaluation that "...are automatically activated by the mere presence (actual or symbolic) of the attitude object" (Dovidio, Gaertner, Kawakami, & Hudson, 2002, p. 94; also Banaji & Heiphetz, 2010).

x Some contemporary researchers who utilize a race-sensitive lens postulate that racism in today's society is increasingly non-overt and factually complex – and related to "microaggressions" that covertly reinforce racial stratification and disadvantage in contemporary society. Microaggressions of implicit bias, although hidden, are both pervasive and powerful; and can be more negatively consequential than overt macroaggressions of discrimination – See, Laveist, 1996; Dovidio, Gaertner, Kawakami, & Hudson, 2002. Also see "The Canadian Experience Rule and the Politics of Culture" section in this article.

xi Charter of the United Nations Preamble, <http://www.un.org/en/documents/charter/preamble.shtml>; also see – Human Rights Code, RSO 1990, c H.19, <<http://canlii.ca/t/51tsz>> retrieved on 2015-05-04,

xii Jobs Growth and Long-Term Prosperity: Canada's. 2012. Canada's Economic Action Plan *Public Works and Government Services Canada*, Ottawa, Ontario K1A 0S5 – See "The Stimulus Phase of Canada's Economic Action Plan" pp. 285-356.

xiii *Human Rights Code Amendment Act, SO 2006, c 30 [HRC Amendment Act]*. The OHRC's statutory authority is given by the *Code*. For instance, Section 30 of the *Ontario Human Rights Code* authorizes the OHRC to prepare, approve, and publish human rights policies and to provide guidance on interpreting its provisions. The power to develop policies is part of the OHRC's broader responsibility under section 29 to promote, protect, and advance respect for human rights in Ontario, to protect the public interest, and to eliminate discriminatory practices. Under the mandate of the *Act*, the Commission is now responsible for monitoring the state of human rights and reporting directly to the people of Ontario. It has been given the power to:

- expand its work in promoting a culture of human rights in the province;
- conduct public inquiries;
- initiate its own applications (formerly called "complaints");
- intervene in proceedings at the Human Rights Tribunal of Ontario (HRTO); and
- focus on engaging in proactive measures to prevent discrimination using public education, policy development, research, and analysis.

xiv *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* ["Meiorin"], [1999] 3 S.C.R. 3.

xv See – (OHRC 2013: 3).

xvi Perhaps the most recognizable example of the bias free movement today is in the area of Canadian policing and police services. The bias free policing movement can be dated back to an Annual Conference Resolution of the Canadian Association of Chiefs of Police, August 2004. Here it was determined "that bias-free policing was the most appropriate description, as 'racial profiling' carries with it negative ... assumptions about policing in Canada." Today the softer and more affirmative language of bias-freedom is much preferred to the more aggressive human rights language of barrier-freedom – albeit, with some dramatic racial outcomes throughout North America. The bias free policing movement may have avoided the negative assumptions of policing without avoiding negative consequences. See – The Canadian Association of Chiefs of Police (CACP). 2004. Resolutions Adopted by the 99<sup>th</sup> Annual Conference in Vancouver, British Columbia, 582 Somerset Street West Ottawa, Ontario K1R 5K2, 04 August, pp. 8.

xvii Personal interview with an OHRC service operator July 3, 2014. (As part of the on-going policy evaluation process OHRC officials informally monitor the general job search websites – including Eluta, Monster, Beyond.com Careers, Craigslist, Charity Village, Hot jobs, Wow Jobs, Workopolis and others. From the inception of the policy, there has been a noticeable decline in the official use of 'Canadian experience' as a formal hiring criterion in Ontario.)